STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER BRIAN HESS,

Defendant-Appellant.

UNPUBLISHED
November 19, 2002

No. 235651
Oakland Circuit Court
LC No. 2001-177490-FC

Before: Jansen, P.J., and Holbrook, Jr., and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a). Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of twenty-five to fifty years' imprisonment. We affirm.

In September 2000, Christina Wolfe of the Family Independence Agency received a referral regarding defendant and his four minor children. As part of her investigation, Wolfe visited the boarding house where defendant and the children lived. After the visit, Wolfe interviewed defendant's eight-year-old son and seven-year-old daughter at their school. As a result of this initial investigation, Wolfe offered defendant services and made some suggestions on how to better care for his children. Several days later, defendant contacted Wolfe and told her that he could no longer care for the children. Defendant wanted Wolfe to remove the children from his care and custody. After meeting with some potential caseworkers, defendant indicated that even with assistance, he did not believe he could care for his children. Subsequently, Wolfe filed a petition and made arrangements for the children to go into foster care.

Eventually, defendant's eight-year-old son and seven-year-old daughter were placed in the home of Colleen Glenn, and the two younger children were placed in another home. Glenn testified that in November 2000, she looked in on the boy and the girl while they were playing in a bedroom, and saw the girl "about to pull her panties down" while the boy was laying on the bed. Glenn immediately removed the two children to the living room where she asked "if they had something to talk about." In response to what the children had to say, Glenn contacted her caseworker the next morning.

In December 2000, Protective Services submitted the case to the Pontiac Police Department, where it was assigned to Detective Darence Betts. Arrangements were made to

have all four children interviewed at Care House, and Betts observed the interviews. As a result of the interviews, Betts "determined that it was absolutely necessary" to interview defendant. During his initial interview, defendant denied the allegations of sexual abuse. At a subsequent interview, defendant once again denied the allegations. However, Betts testified that defendant also indicated "that there may have been some touching that was involved, maybe a couple of situations that he wasn't comfortable with."[1]

At trial, defendant's then nine-year-old son testified that he and his siblings slept in one room with their father at the boarding house. In that room was a bed and another mattress that was placed directly on the floor. The boy testified that on numerous occasions, defendant would anally penetrate the boy while he was lying on the bed. The boy estimated that defendant had done this "[l]ike 90" times. Additionally, the boy stated that defendant had placed the boy's penis in defendant's mouth, also "[l]ike 90" times, and that the reverse had also occurred. The boy maintained that the minor son of defendant's girlfriend, his two cousins, and an uncle had also sexually abused him.

The boy also testified that he had witnessed defendant anally penetrate his seven-year-old sister. Additionally, he stated that defendant had instructed the boy to engage in similar activities with his seven-year-old sister, and that defendant had taken pictures of this activity. Defendant's seven-year-old daughter testified that defendant had done things in the bedroom that made her feel bad "[l]ike almost every night," but when asked what those things were, the girl repeatedly stated that she had forgotten.

Before trial, the court granted the prosecution's motion to introduce other acts evidence pursuant to MRE 404(b). Defendant argues on appeal that the trial court erred in allowing the admission of this evidence. We disagree. Count one of the criminal complaint referred to one act of anal penetration involving defendant's son, count two referred to one act of fellatio performed on defendant's son, and count three referred to one act of fellatio by the boy on defendant. In its motion, the prosecution argued that evidence of other alleged acts of abuse committed on defendant's son was admissible under *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973). The prosecution also argued that evidence related to alleged assaults made on defendant's seven-year-old daughter were admissible because the uncharged acts were sufficiently similar to support an inference that the charged acts were part of a common plan, scheme, or system. In answer to the motion, defendant stated that he had "no objection to the testimony involving [his son] . . . to those acts allegedly perpetrated on himself by Defendant." However, defendant did object to the admission of evidence regarding his daughter.

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[1] In a written statement that was read into the record, defendant elaborated on what these incidents were:

> I woke up. Son . . . had stripped his close [sic] and gotten in bed with me. I was nude. I woke up, my penis was touching him. I then got out of bed and used the bathroom.
>
> I also touched his penis when potty training him. He took a shower with me, he touched my penis and asked why mine was bigger and had hair on it.

Clearly, defendant has preserved for appellate review the issue of other acts evidence regarding his daughter. The prosecution argues, however, that given defendant's position that he had "no objection to the testimony involving" his son, review of the admissibility of that evidence has been foreclosed. "Waiver has been defined as 'the "intentional relinquishment or abandonment of a known right."' It differs from forfeiture, which has been explained as 'the failure to make the timely assertion of a right.'" *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citations omitted). While it is not clear under the case law whether the affirmative assertion that one is not going to object to an action of the court constitutes a waiver, it is clear that acquiescence to the court's handling of an issue does extinguish any error. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). In *Carter*, the Supreme Court concluded that because defense counsel had "clearly expressed satisfaction with the trial court's decision to refuse the jury's request [to review certain testimony] and its subsequent instruction," any error in that procedure had been affirmatively waived. *Id.* at 219. In his brief in opposition to the prosecution's other acts motion, defendant "concede[d] that evidence is in fact admissible pursuant to *People v DerMartzex* as stated in the Prosecution's brief." Given the prosecution's argument and the remaining argument presented by defendant, it is clear to us that defendant was conceding that testimony concerning uncharged acts involving defendant's son was admissible.[2] Defendant's acquiescence, therefore, extinguishes any error in the admission of this portion of the other acts evidence.[3] *Fetterley, supra* at 520.

Under MRE 404(b), other acts evidence may be admitted where: (1) the evidence is offered for some purpose other than propensity; (2) the evidence is relevant and material; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). "[T]he trial court, upon request, may provide a limiting instruction under MRE 105." *Id.* at 75. Accord, *People v Sabin (After Remand)*, 463 Mich 43, 55-59; 614 NW2d 888 (2000).

The prosecution argued that the testimony about defendant's daughter was relevant under the theory that it showed defendant's plan, scheme, or system in doing the charged acts. This is a permissible theory of admissibility, and thus satisfies the first prong of the *VanderVliet* test. *Sabin (After Remand), supra* at 63.

Defendant's general denial of the charges placed all the elements of the charges at issue. *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998). Pursuant to the sufficiently similar test established in *Sabin (After Remand)*, we believe that reasonable people could conclude the

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[2] Although defendant asserted in his brief in opposition to the prosecution's other acts motion that he "believes that [the] evidence [regarding defendant's son] is much more prejudicial than probative," he did not argue that this evidence should be excluded on that basis. Therefore, because defendant did not ask the court to exercise its discretion to preclude the evidence under MRE 403, we do not view this as an alternate ground for invoking appellate review. See *DerMartzex, supra* at 415.

[3] Even if the issue of testimony concerning uncharged acts involving defendant's son is considered forfeited, we see no plain error affecting substantial rights for the reasons set forth in the discussion of testimony concerning uncharged acts involving defendant's daughter. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

charged and uncharged acts contained sufficient common features to infer the existence of a common plan, scheme, or system in committing the charged acts. *Sabin (After Remand), supra* at 66. Both victims were defendant's children, both children were of similar age, the method of abuse was similar and occurred in the same location, and the abuse of both children was allegedly prolonged. Thus, the second prong of the *VanderVliet* test is satisfied.

We also conclude that the third prong of the *VanderVliet* test is satisfied, because we do not believe that danger of unfair prejudice presented by this evidence substantially outweighs its significant probative value. MRE 403. The test for admission of other acts evidence requires a trial court to consider not the danger of prejudice, but the danger of unfair prejudice. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). We do not believe that this evidence was marginally probative. Further, we note that the jury was instructed not to make the forbidden character inference from this evidence.[4] The fact that the jury found defendant not guilty of the third count of CSC I supports the presumption that the jury did follow this instruction. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Accordingly, we hold that the trial court did not abuse its discretion in admitting evidence regarding uncharged acts of sexual assault involving defendant's daughter.

Next, defendant argues that the verdict is against the great weight of the evidence. Defendant's failure to move for a new trial on this basis means that he has waived appellate review of this issue absent a miscarriage of justice. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). Defendant asserts that his son's testimony was so incredible that it was not worthy of belief. This is essentially a credibility argument. We see no reason to invade the jury's province in assessing the credibility of the witnesses who appeared at trial. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). While there was some conflicting testimony, and defendant's son undoubtedly characterized some of the facts through the perspective of a child,[5] we believe that the evidence reasonably supports the verdict. *Noble, supra* at 658.

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[4] The court instructed the jury on this issue as follows:

> You have heard evidence that as introduced to show that the defendant engaged in improper sexual conduct for which the defendant is not on trial. If you believe this evidence, you must be very careful to consider it for only one limited purpose. That is, to help you judge the believability of the testimony regarding the acts for which the defendant is on trial. You must not consider this evidence for any other purpose.
>
> For example, you must not decide that its shows that the defendant is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct.

[5] Defendant cites his son's testimony that the assaults occurred "[l]ike 90" times. As instructed by the court, the jury was free to reject this as being imprecise and still accept other aspects of

(continued…)

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper

(…continued)

the boy's testimony.